
(2011) 12 GAU CK 0043
In the Gauhati High Court
Case No : Criminal Ptn. No. 21 of 2011

Ratan Lal Banik

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Criminal Procedure Code, 1973 — Section 313

Criminal Procedure Code, 1973 (CrPC) — Section 313

Citation : (2012) 2 GLR 896 : (2012) 2 GLT 252

Hon'ble Judges : U.B.Saha, J

Bench : Single Bench

Advocate : Mr. S. Kar Bhowmik for the petitioner., Mr. R.C. Debnath for the respondent., Advocates appearing for Parties

Judgement

1. The instant petition under section 482, Cr.PC read with section 483, Cr.PC has been filed by the petitioner, Sri Ratan Lal Banik, an accused, in GR Case No. 259 of 2009 under section 354, IPC, pending before the learned Judicial Magistrate, 2nd Class, Kamalpur, North Tripura, for quashing the order, dated 16.7.2011, (Annexure E), whereby and whereunder, the learned trial court rejected his prayer for further examination under section 313, Cr.PC, and also to quash the order, dated 22.7.2011, (Annexure G), whereby and whereunder, the learned trial court rejected the prayer of the petitioner, inter alia, to stop the trial of the case and also to place the aforesaid case record before the learned Chief Judicial Magistrate, North Tripura for transferring the said case in any other court having jurisdiction.

2. Heard Mr. S. Kar Bhowmik, learned counsel appearing for the accused petitioner and Mr. R.C. Debnath, learned P.P., Incharge of the case.

3. As agreed to by the learned counsel for the parties, the matter is taken for disposal at the admission stage.

4. The factual matrix of the case is as under :

On 7.10.2009, one Sri Samir Ranjan Ghosh (PW1), lodged a written ejahar to the Officer Incharge, Kamalpur P.S. stating, inter alia, that on 3.10.2009 at around 10 p.m. when he went to his mother's homestead hut for taking Prasad of Laxmipuja keeping his wife alone in the room, at that time, the petitioner illegally entered into his house and kicked the door of the said room and kept shouting to his wife to open the door. When the wife (PW2) of the informant opened the door, the accused petitioner entered into the room and embraced his wife and started scuffling. Somehow his wife could set her free and thereafter started shouting to which the informant (PW1) returned to his house and detained the accused petitioner. Villagers also assembled there and found the accused petitioner there. Ultimately, the accused petitioner was released by the informant (PW1) as the village elders promised to him that they would settle the matter through Panchayat.

5. After completion of the investigation, the I.O of the case submitted charge sheet against the petitioner under section 448/356, IPC and the case being renumbered as GR case No. 259 of 2009 was placed for trial. During trial, charge was framed against the petitioner under section 354, IPC and the petitioner being asked by the trial court pleaded not guilty and claimed to be tried.

6. During the trial, the prosecution examined as many as twelve witnesses including the I.O. It appears from the trend of the crossexamination that the defence case of the accused petitioner before the trial court was that he was falsely implicated in the case. The further case of the petitioner is that the prosecution witness, PW2, wife of PW2 (alleged victim) and her husband, PW1, the informant, PW4, Biplab Ghosh, brother in law of PW2, and PW7, Tapan Ghosh, another brother in law of PW2 were workers in the rubber plantation of the petitioner and they were regularly stealing latex from the plantation of the petitioner. And on 29.9.2009, the aforesaid prosecution witnesses were caught red handed while stealing latex from the rubber garden of the petitioner and in this regard, a village meeting was held on 30.9.2009 presided over by the Panchayat Member, Smt. Rita Ghosh and the aforesaid prosecution witnesses were called in the meeting, but they did not come in the meeting. Hence, the next meeting was fixed on 10.10.2009 by the villagers after preparing a written resolution of the meeting dated 30.9.2009. Getting the aforesaid information of the meeting, the informant (PW1) filed the instant case against the accused petitioner on 7.10.2004.

7. Further defence case of the petitioner is that on the night of Laxmipuja, the son of PW1 and 2, namely, Pinku was caught red handed by the petitioner while stealing coconut from the trees of the petitioner and Pinku was detained by the petitioner. Thereafter, PW1 and 2, i.e., the parents of Pinku asked the petitioner to forgive Pinku. Accordingly, Pinku was released by the petitioner.

8. On completion of the prosecution evidence, the petitioner was examined under section 313, Cr.PC on 22.6.2011 and in answering to question No. 10, the petitioner stated in detail the aforesaid defence case, but the same was not

recorded by the trial court which caused immense prejudice to the petitioner, although the accused was asked by the learned trial court as to whether he got anything else to say and the accused answered and pleaded his defence case as stated supra.

9. After completion of examination of the accused petitioner under section 313, Cr.PC, the case was posted for argument on 16.7.2011 and on that date, the matter of nonrecording the statement of the petitioner came to the notice of the learned Counsel of the petitioner. Therefore, a petition was filed before the trial court to reexamine the petitioner under section 313, Cr.PC and also to record the aforesaid defence plea. The learned trial court vide his order dated 16.7.2011 rejected the said prayer for reexamination of the petitioner under section 313, Cr.PC recording, inter alia, that on 22.6.2011, the accused petitioner appeared with his engaged learned counsel and accordingly, he was examined under section 313, Cr.PC on the basis of incriminating materials appearing against him in the evidence adduced by the prosecution in separate sheet of paper and during his examination he denied all allegations leveled against him by the prosecution and also on being asked by the trial court as to whether he had got anything else to say, the accused stated that he has been falsely implicated and also declined to adduce any evidence in his defence. Thereafter, the accused petitioner, who is a school teacher, after comprehending fully, had put his signature on each and every sheet.

10. On 22.6.2011, neither the accused nor his learned counsel has filed any petition for further examination of the accused under section 313, Cr.PC and the learned trial court also recorded that on 12.7.2011, the accused petitioner was absent and the learned counsel of the accused petitioner by a petition sought for adjournment without raising any question about further examination under section 313, Cr.PC. Only on 16.7.2011, first time a petition was filed narrating the story that during examination of the accused petitioner under section 313, Cr.PC, the accused petitioner pleaded his defence case so called, but the court inadvertently did not record the same and also prayed for further examination of the accused petitioner under section 313, Cr.PC. Thereafter, the accused petitioner filed another application stating, inter alia, that he had lost his confidence and faith upon the trial court and prayed for stopping the trial and also to place the record before the learned C JM, North Tripura so that the same can be withdrawn from the trial court and transferred to any other court.

11. Being aggrieved by the order dated 16.7.2011 and 22.7.2011; the petitioner preferred the instant petition.

12. Mr. Kar Bhowmik, learned counsel for the petitioner, while urging for quashing the impugned order and de novo trial would contend that though 12.7.2011 was the date fixed for argument of the case, but due to massive political unrest in the State, he could not reach Kamalpur from Agartala and the learned counsel who was engaged locally also could not argue the case being he was not prepared. He further contended that examination of the petitioner under

section 313, Cr.PC was done in the official chamber of the Presiding Officer in absence of the learned counsel engaged locally and he was even not provided to inspect the record on the subsequent date, i.e., on 12.7.2011. He again contended that on 16.7.2011, the case was posted again for argument and on that date, he himself perused the record and detected that the defence plea has not been recorded in the statement under section 313, Cr.PC though stated by the accused. He also raised his voice, inter alia, that the trial court framed question in compound sentences clubbing materials together, answers of which were not supposed to be given by the petitioner, particularly, he referred to question No. 2 and 9 and from such action of the trial court, it can be easily said that there was no application of mind on the part of the trial court in examining the accused petitioner under section 313, Cr.PC and such perfunctory recording of 313 statement should not be allowed to be considered against the petitioner as he would be prejudiced for such recording of statement, the learned counsel contended.

13. He further contended that section 313, Cr.PC is enacted by the Legislature for the benefit of the accused and when there is failure of sufficient compliance of such provisions, such failure can be cured under section 465, Cr.PC. According to him, nonrecording of defence case stated by the petitioner is mere irregularity which is curable; the learned trial court ought to have regularized the matter by way of further examining the accused under section 313, Cr.PC for the sake of interest of justice. For better appreciation, it would proper to quote Section. 313 of the Code, which is as follows :

"313. Power to examine the accused. (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court

(a) may at any stage, without previously warning the accused put such questions to him as the court considers necessary;

(b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence question him generally on the case :

Provided that in a summons case where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under subsection (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such question, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

14. In support of his aforesaid contention, he has placed reliance on a decision of the High Court of Orissa in *Rusi Biswal v. Nakhyatramalini Devi and Others*, AIR 1954 Ori. 65, particularly, paragraphs 4 and 6, which are reproduced hereunder :

"(4) Section 342, Cr.PC, enables the court to "put any questions to the accused at any state of an enquiry or trial for the purpose of enabling the accused to explain the circumstances appearing in the evidence against him".

The section is wide in its language and does not limit the power of the court to examine the accused at any particular stage. The court can examine him as often as it thinks it necessary to do so, to enable the accused person to explain any circumstances appearing against him in the evidence, the object of the section being to see whether the accused can give an innocent explanation of the facts spoken to against him. There is nothing in the language of the section which would prevent the court from examining the accused even after the defence evidence has been recorded; and even if the statement had not been signed by the Mukhtear it was open to the court to examine the accused after the defence evidence had been recorded, if anything needed explanation. I am, therefore, unable to find anything illegal in the procedure adopted by the Magistrate.

Even if it can be said that the order passed by him is not in accordance with the strict interpretation of section 342, Cr.PC, all that he has done may amount only to an irregularity which is curable under section 537 of the Code, it was open to the complainant who was represented by pleaders to point out the irregularity at an earlier stage in the proceeding. Not having done so it appears to me that the objection now taken has no force and the petitioner can have no reasonable cause to complain of any failure of justice having been occasioned by the irregularity of procedure adopted by the Magistrate.

5. ** ***

6. The next question is whether the accused should have been personally examined or whether the examination of the Mukhtear who had been permitted to appear for her, is sufficient compliance with the section. The Bombay High Court appears to have taken the view that section 342, Cr.PC, should be read as subject to the provisions of section 205. In *Emperor v. Jaffar Cassum Moosa*, AIR 1934 Bom. 212 (E) Beaumont C.J. following an earlier decision of that court held that the Magistrate was not bound to examine the accused personally if permission had been given under section 205, Cr.PC to exempt him from personal appearance, section 205, Criminal Procedure Code reads as follows : (His Lordship quoted the provisions of the section and stated),. Subsection (2) only gives a discretion to the Magistrate to direct the personal attendance of the accused at any stage of the proceedings. It is not obligatory on him, therefore, to direct the personal attendance of the accused at any stage, including examination under section 342. If the Magistrate is satisfied that the examination of the Mukhtear on behalf of the accused is sufficient, the nonexamination of the accused personally would not render the trial illegal.

There is also a single Judge decision of the Rangoon High court in *Po Nyein Maung v. Hate Singh*, AIR 1927 Rang. 73(F) where it was held that women may be permitted to answer examination through their pleaders, and that the benefit of section 205, Cr.PC, might be extended throughout the trial except when a judgment, accompanied by a sentence of imprisonment, is to be delivered.

It is needless to point out here that section 342, Cr.PC, is a provision intended for the benefit of the accused and that the accused is not bound to make any statement. It would be ridiculous to suggest that even for the purpose of recording a refusal to make a statement, the personal attendance of the accused should be insisted upon. In this case, in particular, the first accused is said to be a respectable lady observing purdah. Her statement was a complete denial of the offence. This court as well be made through her pleader, without prejudicing the case of the complainant and to insist on her personal attendance would involve unnecessary waste of time and harassment to the accused."

15. He also placed reliance on a decision of the Division Bench of this court in *SH. Lalsangzuala v. State of Mizoram*, 2011 (1) GLT 471, in which I was a party. He further placed reliance on another decision of the Division Bench in *Gopal Goraik v. State of Assam*, 2011 (2) GLT 425 wherein their Lordships of Division Bench quashing the statement recorded under section 313, Cr.PC while remanding the case for de novo trial noted that the matter is remanded to the learned trial court with a direction that the learned trial court in accordance with the underlying principles of section 313, Cr.PC shall put all the circumstances appearing against the accused appellant to enable him to explain the incriminating circumstances and provide him all opportunity to adduce evidence, if he wishes, in his defence.

16. Mr. Kar Bhowmik while urging for transfer of the case from the court of the learned Judicial Magistrate, 2nd Class, Kamalpur, North Tripura placed reliance on a decision of this court in *Khokan Debbarma v. State of Tripura*, 2011 (2) GLT 431 and would contend that the assurance of a fair trial is first imperative of dispensation of justice and central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of the parties or easy availability of legal service or like trivial grievances. The court has to consider when a justice seeker has lost his faith and the court should take all necessary steps for washing its hands so that the justice seeker can get the justice.

17. Mr. Debnath, learned P.P., Incharge of the case while resisting the prayer for transfer would contend that if the prayer for transfer is allowed, then that would be injustice not only to the prosecution, but also to the trial court. According to him, the case of *Khokan Debbarma* (supra) has no direct bearing with the instant case, as in that case, the petitioner asked for quashing the proceeding or to withdraw the case from the Court of Additional Sessions Judge on the ground that the presiding judge of the aforesaid Court is a relation of one Mr. B.B. Das, the exChairman of Tripura Public Service Commission (TPSC), who is closely

associated with Mr. B.K. Roy, a Commissioner to the Government of Tripura, against whom the petitioner moved an application wherein some accusations were made against him relating to the death of the wife of the petitioner as she was working under him, but unfortunately the police did not investigate the case on the line of accusations made by the petitioner, rather the petitioner of that case was implicated for the death of his wife for which he is facing trial. Thus, the petitioner had an apprehension that he would not get justice from the court of the learned Additional Sessions Judge, West Tripura, Agartala, Court No. 3.

18. He further contended that in the instant case, the petitioner did not make any application at an early stage either for withdrawal of the case by the learned C JM, North Tripura or for transferring the same to any other court having jurisdiction; he raised his voice only when his petition for further examination section 313, Cr.PC has been rejected. Thus, the learned trial court rightly rejected his prayer as the same was raised at a belated stage. He further contended that the accused petitioner is not a mere rustic villagers, rather he is a teacher of a school and after careful reading of the answer recorded by the trial court, he had put his signature. He again contended that even on the first day of the argument, i.e., on 16.7.2010, neither the petitioner nor his counsel raised their voice. It is only on the date of argument fixed for second time, the petitioner raised his voice through his learned Counsel which is nothing but an afterthought. Therefore, the learned trial court rightly rejected the same.

19. In Gopal Goraik (supra), the Division Bench has taken note of Tara Singh v. State of Punjab, AIR 1961 SC 441, wherein the Apex Court while considering the section 342 of the earlier Code, held that it cannot stress too strongly the importance of observing faithfully and fairly the provisions of section 342 of the Code and it is not sufficient compliance to string together a long series of fact and ask the accused what he had to say about them. Bearing in mind the aim and object of the section, which is to afford a fair and proper opportunity of explaining the circumstances which appeared against him, logically and rationally, the questioning must be done in such manner and in such a form which even an ignorant and illiterate person can appreciate and understand. Even otherwise, an accused would be somewhat perturbed when he is facing a charge and, therefore, fairness demands that each material fact should be put simply and separately. The Apex Court also held that every error or omission to record the statement in that behalf would not necessarily vitiate a trial because errors of these type fall within the domain of curable irregularities. The fall out of such omission or errors in each case depends upon the degree of error and whether prejudice had been occasioned or is likely to have occasioned.

20. The Division Bench also took note of Basavaraj R. Patil and Ors. v. State of Karnataka, (2000) 8 SCC 740 wherein the Apex Court had discussed the aims and objects of section 313 of the code which are as under:

"(10) Dealing with the position as the section remained in the original form under the old Code, a three Judge Bench of this court (Fazal Ali, Mahajan and Bose, JJ)

interpreted the section in *Hate Singh Bhagat Singh v. State of Madhya Bharat*, AIR 1953 SC 468".

"[T]he statements of the accused recorded by committal Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box; they have to be received in evidence and treated as evidence and be duly considered at the trial",

"(20) At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim "*audi alteram partem*". The word "may" in clause (a) of subsection (1) in section 313 of the code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the subsection it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstances about which the accused was not asked to explain cannot be used against him."

21. In *Naval Kishore Singh v. State of Bihar*, (2004) 7 SCC 502, the Apex Court while considering the submission of learned counsel of the appellant in that case noted that under section 313, Cr.PC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation.

22. It appears from the record of the instant case, particularly the statement recorded under section 313, Cr.PC that the learned trial court while examining the accused petitioner put question relating to the circumstances appearing in the evidence against him by way of complex question in compound sentence which would be evident from Question No.2 and 9 which are reproduced hereunder :

"Q. No. 2. PW1, Sri Samir Ranjan Ghosh, the informant of this case deposed that on the day of Laxmipuja in the year 2009 at about 11 p.m. he along with his brother in law Sri Keshab Ghosh, PW3 and his friend Sriamar Das PW6 while having Prasad in the house of his brother he heard alarm of his wife, PW2 the victim of this case, and rushed to his kouse along with PW3 and 6 and found that you were scuffling with his wife and that they managed to detained you and put you in a room of their house.

Have you got to say anything in this regard?

Q. No.9 : PW11 Sri Udhyam Debbarma, the I/O of this case deposes that on 7.10.2009 in furtherance of an endorsement of the O/C KMP P/S he investigated

the instant case and during investigation visited the P/O and prepared hand sketch map with separate index examined witnesses and recorded their statement under section 161 of, Cr.PC and also arrested you on 7.10.2009 and subsequently the offence being bailable you were released from the P/S and a prima facie case having been established against you submitted charge sheet as KMP P/S C/S No. 90/09 dated 26.10.2009 under section 448/354 of IPC.

Have you got to say anything in this regard?

23. When the Apex Court in its various decisions stated that aim and object of section 313, Cr.PC is to provide fair and proper opportunity to the accused for explaining circumstances appearing against him and questioning must be done in such a manner and in such a way which even an ignorant and illiterate person can appreciate and understand, the questions put by the learned trial court as mentioned above cannot be treated as simple as required.

24. While questioning, the learned trial court put the evidence of various witnesses by a single question to the accused, petitioner which, according to this court, is not proper. While questioning an accused for giving his explanation relating to the circumstances which appeared against him, it should be done in a simple manner, not with complex question. Not only that, the evidence of witnesses on different points should not be put together as that would create confusion on the part of the accused to answer to the questions put to him. It is also the duty and responsibility of the court to see that there should not be any apprehension in the mind of the accused that he is not getting justice as he is entitled under the law.

25. In a criminal case, when questions put to the accused relating to incriminating materials against him and answer given by the accused on those questions were not enough, the court is to give opportunity to the accused to explain and justify the reasons for his implication by the prosecution in the case by way of explanation and the court is also bound to consider such explanation along with answer to see as to whether the same is corroborated with the evidence of the witnesses in the case and such answer and explanation of the accused can be used in his favour or even against him by the trial court while deciding a case, i.e., the explanation of the accused can be treated as an evidence like the evidence of the prosecution witnesses.

26. In the instant case, it is alleged that though questions put to the accused petitioner on the evidence of the prosecution, but did not record the statement of the accused petitioner in detail, particularly, the defence case, which he has stated at the time of examination and for such nonrecording, the accused petitioner is prejudiced. It also appears from the record that even when the petitioner by way of filing a petition requested the learned trial court to reexamine him under section 313, Cr.PC so that he can make his statement in detail explaining his defence case, but the said request was also rejected on the ground that:

"On 16.7.2011, i.e., today itself for the first time a petition is filed narrating a story that during the examination of the accused, Sri Ratanlal Banik under section 313 of Cr.PC the consider when a motion for transfer is made is not the hypersensitivity or relative convenience of the parties or easy availability of legal service or like trivial grievances,. Something more substantial, more compelling, more imperiling from the point of view of public justice and its attendant environment is necessitous if the court is to exercise its power of transfer." (See *Maneka Sanjay Gandhi v. Rani Jethmalani*, AIR 1979 SC 468).

27. Whether the accused petitioner had actually stated his defence case before the trial court or not while recording his statement under section 313, Cr.PC that can be said only by the trial court as the petitioner had allegedly made such statement before the trial court. It would not be proper for this court to make any comment regarding such nonrecording of his statement as alleged by the petitioner.

28. According to this court, as the petitioner subsequently raised the question of nonrecording of his statement before the learned trial court by way of filing an application, according to this court, the learned trial court ought to have recorded his statement in his defence case by way of reexamining him under section 313, Cr.PC as section 313, Cr.PC in no way prohibit the learned trial court for calling the accused even second time to answer the incriminating circumstances, but undoubtedly 11"I power to call an accused to answer the questions more than once after conclusion of the prosecution evidence should not be used in a routine and mechanical manner.

29. This court has also considered the submission of Mr. Kar Bhowmik relating to withdrawal of GR case No. 259 of 2009 and transfer the same to any other court as well as the decision of this court in *Khokan Debbarma* (supra). Upon scrutiny of the record as well as the aforesaid decision, this court is of considered opinion that this is not a fit case for withdrawal of the GR Case No, 259 of 2009 from the file of the learned Judicial Magistrate, 2nd Class, Kamalpur, North Tripura and place the same before the learned Chief Judicial Magistrate, North Tripura for transferring the case in any other court having jurisdiction.

30. In the instant case, as the accused petitioner doubted regarding the intention of the court, it would be proper on the part of the court to remove the said doubt in the interest of justice so that the accused petitioner can feel that the court has provided all the opportunity to him to prove his innocence relating to incriminating circumstances against him. If really the petitioner stated his defence case and the same was not recorded by the trial court, then that would undoubtedly cause prejudice to the accused petitioner. More so, that was also an injustice caused to him. Therefore, the trial court ought to have recorded his statement of his defence case.

31. In *Rusi Biswal* (supra), the learned Single Judge of the Orissa High Court while considering the section 342, Cr.PC(Old), specifically stated that the court

can examine an accused as often as it thinks it necessary to do so to enable him to explain any circumstances appearing against him in the evidence as the object of the section is to see whether the accused can give an innocent explanation of the facts spoken to against him. There is nothing in language in that Section which would prevent a court from examining the accused in a subsequent stage in the interest of justice.

32. In the instant case, as the petitioner has approached this court with a grievance of nonrecording of his defence case by the trial court while examining him under section 313, Cr.PC, according to this court, it would be proper to set aside the order impugned herein as well as the statement recorded by the trial court under section 313, Cr.PC and to remit the matter back to the learned trial court.

33. Accordingly, the statement recorded under section 313, Cr.PC and impugned orders dated 16.7.2011 and 22.7.2011 (Annexures E and G to the petition respectively) are hereby quashed and the matter is remitted back with a direction that the learned trial court shall record the statement of the accused petitioner under section 313, Cr.PC afresh by way of putting all the circumstances appearing against the accused petitioner for enabling him to explain the incriminating circumstances including his defence case providing him all opportunities to adduce evidence, if any and he so wishes in his defence. It is further directed that the learned trial court upon receipt of the copy of this judgment shall issue notice upon the accused petitioner so that he can appear before the trial court for examining under section 313, Cr.PC afresh. The trial court shall proceed with the trial from the stage of recording the statement of the accused petitioner under section 313, Cr.PC. The aforesaid direction is made considering the fact that the trial has not yet been complete.

34. In the result, the petition is allowed and disposed of.